IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1221 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANUBEN DAUGHTER OF JAYSINH KHUSHALSINH

Versus

STATE OF GUJARAT

Appearance:

MR SURESH M SHAH for Petitioners

RULE SERVED for Respondent No. 1

MR KH BAXI for Respondent No. 4

MR YF MEHTA for Respondent No. 5, 6

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 10/1/2001

C.A.V. JUDGEMENT

#. The prayer of the petitioners in this petition is for quashing the order of the Deputy Collector dated 5-5-1992 (Annexure-'A'), order dated 17-9-1992 of the Collector, Bharuch (Annexure-'B') and order dated 28-12-1995 of the Deputy Secretary (Appeals), Revenue Department, Government of Gujarat (Annexure-'C').

#. The brief facts giving rise to this petition are as under:-

On 4-8-1990, the petitioners purchased agricultural land of Survey No.160/1 of Jadeshwar from one Bhailal Patel for a sum of Rs.61,000=00. The purchase was reported to the revenue authorities whereupon, Mutation Entry No.4617 was made in the name of the petitioners on 5-8-1990 in Form No.6 in the revenue records. This entry was certified on 29-12-1990 after necessary verification. On 22-8-1991, the Chief Secretary (Appeals), Revenue Department, Ahmedabad instructed the Deputy Collector, Bharuch for initiating proceedings for review of the mutation entry. On 5-5-1992, the Deputy Collector, Bharuch registered a Revision Case No.15/1992 against the petitioners & the vendor and ultimately cancelled the mutation entry on 5-5-1992. This action seems to have been taken on the application dated 22-8-1991 of one Jayeshbhai Patel, resident of Jadeshwar given in the office of the Chief Secretary (Appeals), Revenue Department, Ahmedabad, pointing out the irregularities in the sale deed. Feeling aggrieved from this order, revision was preferred before the Collector, who dismissed the same on 17-9-1992. Another revision was also preferred by the petitioners against the order of the Collector, which was dismissed by the Deputy Secretary (Appeals), Revenue Department on 28-12-1995. These three orders are under challenge in this petition, mainly on the following grounds :-

(1) That the action of suo motu revision was taken beyond reasonable period, and since revision was initiated after about 2 years of certification of mutation entry, the impugned orders become without jurisdiction and illegal;

(2) The order of the Deputy Collector (Annexure-'A') is totally without jurisdiction;

(3) The proceedings for review of mutation entry were also without jurisdiction; and

(4) The powers conferred on one authority under two acts can not be simultaneously exercised in proceedings under one of such Act.

#. No counter affidavit has been filed from the side of the respondent, though the petition was admitted on

15-2-1996. Thus, prima facie, it has to be believed that whatever is alleged in the writ petition remained uncontroverted, and as such there is no reason to dismiss the petition.

#. In addition to this, if the points under challenge are considered, it can be said that the points raised are not without substance.

#. So far as the point of delay in taking suo motu action is concerned, undisputed facts are that, the land was purchased by the petitioners on 4-8-1990. Mutation Entry No.4617 was made in the name of the petitioners on 5-8-1990. Thereafter, necessary verification was made and the mutation entry was certified on 29-12-1990. On 22-8-1991, the Chief Secretary, Revenue Department instructed the Deputy Collector for initiating suo motu proceedings in revision for cancellation of the entry. Thus, from the date of the mutation entry, namely, from 5-8-1990, the instruction given by the Chief Secretary on 22-8-1991 was beyond period of one year. For taking suo motu action in review, no time is prescribed under the Bombay Land Revenue Code but, the order Annexure-'A' shows that, as a result of suo motu action initiated after expiry of one year of mutation entry, the same was cancelled by order dated 5-5-1992. Thus, cancellation was effected after a period of about two years. It was definite case of the petitioners that such action could not be taken after expiry of reasonable period.

#. In the case of MOHAMAD KAVI MOHAMAD AMIN v. FATMABAI IBRAHIM reported in (1997) 6 S.C.C. 71, the Supreme Court has held that, 'where suo motu enquiry by Mamlatdar under sec.84(C) is to be taken, it should be initiated within a reasonable time.' It was further held that, 'suo motu power under sec.84(C) should be exercised within reasonable time, where no time limit is prescribed for exercise of power under such statute.' The same view has been taken in case of STATE OF GUJARAT v. JETHMAL BHAGWANDAS SHAH Spe.W.A No.2770/1979 decided on 1-3-1990. This was also a case under sec.84(C). Further, in case of STATE OF GUJARAT v. PATIL RAGHAV NATHA (1969) 2 S.C.C. 187 and in RAM CHAND v. UNION OF INDIA (1994) 1 S.C.C. 44, it was impressed and held that, where no time limit is prescribed for exercise of a power under a Statute it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. 'Reasonable time' in such cases has to be held to be not exceeding one year.

#. Regarding exercise of revisional powers under sec.211

of the Bombay Land Revenue Code, this Court in P R RATHOD v. D D MISTRY (1999)2 GLH 310 has held that, 'If sec.211 of the Bombay Land Revenue Code does not prescribe any limitation, it does not mean that such power can be exercised at any point of time, such power can be exercised within a reasonable time.'

#. As against this, Shri Premal Joshi, learned AGP contended that, since the sale transaction was prima facie void, the revenue entry could be cancelled at any point of time and no bar of limitation applies because, such revenue entry will be deemed to be illegal and nonest. I am unable to agree with this contention. It is not a case where, prima facie, the sale transaction could be said to be illegal or nonest. For this, proceedings under sec.84(C) of the Bombay Tenancy Act should have been initiated, which has not been done so far. From the last order of the Deputy Secretary dated 28-12-1995 (Annexure-'C'), it appears that, for the first time, it was directed that the Mamlatdar (ALT) shall proceed separately under sec.84 of the Bombay Tenancy Act. If this is the state of affairs then, it can be said that, so far the competent authorities have not declared the sale to be in violation of the provisions of Bombay Tenancy Act, and consequently the mutation entry, on the basis of such sale deed, can not be said to be prima facie illegal. As such, the bar of limitation will apply, and since action was not taken within a reasonable time for taking suo motu revision under Rule-108(6) of the Bombay Land Revenue Rules, the order of the Deputy Collector (Annexure-'A') is liable to be set aside only on this ground. The observation of the Deputy Collector that, no copy of the judgment of the Supreme Court or the High Court regarding taking entry in revision within one year of certifying the same was filed, hence the contention of the petitioners was not liable to be accepted, is errorneous. The order of the Deputy Collector on the point of delay in taking action is obviously contrary to the pronouncements of this Court and the Apex Court, which have been quoted in the foregoing portion of this judgment. Consequently, the order of the Deputy Collector (Annexure-'A') can not be sustained. If the order of the Deputy Collector (Annexure-'A') can not be sustained then, subsequent orders of the Collector (Annexure-'B') and the Deputy Secretary (Appeals), Revenue Department (Annexure-'C') confirming the order of the Deputy Collector also can not be sustained. Thus, on this ground, all the three orders (Annexures-'A', 'B' and 'C') are liable to be quashed and set aside.

#. The second ground is that, the proceedings were without jurisdiction, in as much as, the Deputy Collector, under sec.211 of the Bombay Land Revenue Code, has no power and authority to quash the revenue entry. Whereas, the contention of the learned AGP has been that, the Deputy Collector has got such power under sec.211 of the Bombay Land Revenue Code. In support of his contention, Shri Joshi relied upon a decision of this Court in GANGABEN v. COLLECTOR, SURAT 1999(1) GLR 488. It was held in this case that, 'Sec.211 is general power of revision which vests in the State Government and any revenue officer not inferior in rank to Assistant and/or Deputy Collector or Superintendent of Survey in the respective department may call for and examine the record of any inquiry or proceedings of any subordinate revenue officer for the purpose of satisfying itself or himself as to the legality or propriety of any decision or order passed and as to the regularity of the proceedings of such officer.' On the basis of this pronouncement, it was argued by Shri Joshi that the Deputy Collector has power to initiate and exercise suo motu power of revision and pass suitable orders. Shri MS Shah, on the other hand, contended that in this case, the proviso to sec.211 was not considered. According to his contention, even though under the amended provision of sec.211 any revenue officer not inferior in rank to an Assistant or Deputy Collector, etc. can call for the record for satisfying regarding legality and propriety of any decision or of order passed and as to the regularity of the proceeding of such order but, final order can not be passed under sec.211 by the Deputy Collector, in as much as, the proviso to sec.211 provides that, Assistant or Deputy Collector shall not himself pass such order in any matter in which a formal inquiry has been held but, shall submit the record with his opinion to the Collector, who shall pass such order thereon as he may deem fit. Thus, according to Shri Shah, what the Deputy Collector in such inquiry has to do is, to conduct and complete the inquiry and submit the record of the enquiry together with his opinion to the Collector and, it is the Collector who shall pass such order looking to the record and the opinion of the Deputy Collector as he may deem fit. The contention of Shri Shah is apparently acceptable in view of clear proviso to sec.211 of the Bombay Land Revenue Code. It is clear from the impugned order (Annexure-'A') that, on the application dated 22-8-1991 of one Jayesh Patel addressed to the Chief Secretary, that the Collector, Bharuch, by letter dated 23-9-1991 asked the Deputy Collector to report after necessary inquiry. Necessary inquiry was conducted by the Deputy Collector, whose opinion was sent alongwith the record to the

Collector and after that, the Collector had sent the same to the Government. Thereafter, under the instruction of the Government to the Collector that the mutation entry was taken in suo motu revision and was cancelled by the Deputy Collector. There was, thus, apparent violation of the proviso to sec.211 of the Bombay Land Revenue Code. It seems that the Deputy Collector felt that he was bound by the direction of the Government and the Collector, but, under the proviso to sec.211 he should not have taken any decision for cancellation of mutation entry, and it was for the Collector to pass such order for cancellation or otherwise of the disputed revenue entry which was duly certified after full-fledged verification of the matter. In this view of the matter, the order of the Deputy Collector is rendered without jurisdiction and proceedings for suo motu revision under sec.211 of the Bombay Land Revenue Code are also rendered without jurisdiction.

##. This Court, in KALPATARU LAND DEVELOPMENT v. ASSISTANT COLLECTOR 1996(2) GLR 600 has held while interpreting the provision of Rule-108(6) that, 'An Assistant or Deputy Collector can call for record and proceedings but can not himself decide the case on an illegality being noticed. The powers can be exercised only by the State Government.' In this case also, the order of the Assistant Collector was challenged, which was held to be invalid and illegal for the aforesaid reasons.

##. In view of the above discussion, the second invalidity regarding jurisdictional error in the order of the Deputy Collector has also to be accepted. If the order of the Deputy Collector becomes without jurisdiction and illegal, subsequent orders contained in Annexures-'B' and 'C' confirming such order of the Deputy Collector also become invalid. Since the Deputy Collector exercised discretion and power at the dictation of his superior officers, such action and order of the Deputy Collector amounts to failure of exercise of discretion, as was held in case of NARANBHAI SHANKARDAS PATEL v. STATE OF GUJARAT 1996(2) GLH (UJ) 3. In BHIL AMBAJI BHANAJI v. STATE OF GUJARAT 1996(2) GLH 272, it was held that, 'A Statutory discretionary power has to be exercised and decision must be taken by the authority itself and by none other. If the authority acted on the instructions of the State Government, it amounts to abdication of function, which renders the decision illegal.

##. In this way, point nos.2 and 3 raised by Shri Shah

stand answered.

##. The last point for consideration is, whether powers conferred on one authority under two acts can be simultaneously exercised in proceedings under one of such Act. In the instant case, the validity of sale transaction could be determined under sec.84(C) of the Bombay Tenancy Act, wherein it could be decided whether the sale deed in favour of the petitioners was in violation of the provisions of sec.63 of the Bombay Tenancy Act and Agricultural Lands Act, 1948. That exercise has not been undertaken so far under the provisions of the Bombay Tenancy Act. On the other hand, one of the impugned orders Annexure-'C' shows that the Deputy Secretary directed the Mamlatdar(ALT) to proceed separately under sec.84 of the Bombay Tenancy Act.

##. So far as the validity of mutation entry is concerned, it is determined in proceedings popularly known as RTS proceedings. RTS proceedings are conducted under Bombay Land Revenue Code and not under Bombay Tenancy Act. It is quite possible that an officer of the Revenue Department may be occupying different capacities under different enactments. That, however, would not empower him to exercise any power under one enactment while proceeding under another enactment. To be more specific, it can be said that an officer exercising power under sec.211 of the Bombay Land Revenue Code could not, in the same proceeding, exercise power under the Bombay Tenancy Act. The two proceedings are of independent nature. The validity of the sale transaction is to be decided under the Bombay Tenancy Act, whereas correctness of mutation entry is to be determined under RTS proceedings. So far as RTS proceedings are concerned, it is well settled that the entries made in the revenue records have primarily a fiscal value and they do not create any title. Such mutations have to follow either the documents of title or the orders passed by competent authorities under special enactments. Independently, the Revenue Authorities, as mentioned in Rule-108 framed under the Bombay Land Revenue Code, can not pass orders for cancelling the entries on an assumption that the transaction recorded in the entry is against the provisions of a particular enactment. Whether the transaction is valid or not has to be examined by the competent authority under the particular enactment by following the procedure prescribed therein and by giving an opportunity of hearing to the concerned parties likely to be affected by any order that may be passed. Provision for summary eviction is to be found under sec.84 of the Bombay Tenancy Act, whereas sec.84(A) of

the said Act relates to validation of transfer made before the appointed day. Sec.84(C) provides for holding inquiry by Mamlatdar where he has reasons to believe that transfer or acquisition has become invalid under any provision of this Act. Prohibition of transfer of land to non-agriculturist is contained in sec.63 of the Bombay Tenancy Act and the effect of transfer in contravention of secs.63 and 64 is dealt with under sec.84(A) of the Bombay Tenancy Act. This exercise could be done by the authorities empowered to act under the Bombay Tenancy Act but, the revenue authorities can not undertake this exercise while deciding the mutation matter in RTS proceeding or deciding revision under sec.211 of the Bombay Land Revenue Code and can not determine the validity of sale transaction. To some extent, where the facts were similar in EVERGREEN APARTMENT v. SPECIAL SECRETARY 1991(1) GLR 113, it was held that power conferred under one enactment can not be exercised while dealing with a question under another enactment, especially so when Revenue Officers are empowered to act under various enactments.

##. In S B SHAH v. STATE OF GUJARAT 1999(2) GLH 82, the facts were that the petitioners purchased land through sale deed. Entries were made in the revenue record on the basis of sale deed. However, when the question of certification of entries came before the Mamlatdar, he refused to certify the same on the ground that the petitioners are not agriculturist, hence, the sale deed is invalid. It was held that the question, whether the petitioners are agriculturists or not can not be decided under Rule-108. Entries are made in the revenue record only for fiscal purposes and such entries do not create any title. The authorities exceeded their jurisdiction in deciding the status of the petitioners in proceedings under sec.84(C) of the Bombay Tenancy and Agricultural Lands Act. Under sec.84(C) of the Bombay Tenancy Act, party can come out with a case of being agriculturist, and this question is to be decided under that section and not otherwise. The point is answered accordingly.

##. For the reasons stated above, I find that all the three orders contained in Annexures-'A', 'B' and 'C' are illegal, hence, the same are liable to be quashed. The petition, therefore, succeeds and is hereby allowed. The impugned orders contained in Annexure-'A' dated 5-5-1992, Annexure-'B' dated 17-9-1992 and Annexure-'C' dated 28-12-1995 are hereby set aside with consequential direction that the original position as it stood before the impugned orders (Annexures-'A', 'B' and 'C') shall be restored and mutation entry which has been ordered under

the impugned orders (Annexures-'A', 'B' and 'C') to be cancelled shall be restored and continued in the name of the petitioners. No order as to costs.

Dated : 10/1/2001. [D.C. Srivastava, J.]

/sakkaf